SUPREME COURT, U. S.

APR 22 1958

JOHN T. FEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1957

No. 43

The vessel M/V TUNGUS, her boilers, etc. and DEN NORSKE AFRIKA-OG AUSTRALIELINIE, WILHELMSENS DAMPSKIBS-AKTIESELSKAB, A/S TONSBERG, A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, and BARBER STEAMSHIP LINES, INC.,

Petitioners,

—against—

OLGA SKOVGAARD, Administratrix ad Prosequendum of the Estate of Carl E. Skovgaard, deceased, and OLGA SKOVGAARD, Administratrix of the Estate of Carl E. Skovgaard, deceased,

Libellant-Respondent,

—and against—

EL DORADO OIL WORKS,

Respondent-Impleaded.

BRIEF OF LIBELLANT-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Counter-Statement of Questions Presented

Whether a state may, in enacting a remedial statute permitting recovery for wrongful death, incorporate by reference the standard of liability under maritime law which existed for the benefit of the deceased if he had lived, where

such deceased was injured and died on the navigable waters of the United States and within the geographic jurisdiction of a state?

Whether a shipowner is under a duty to provide a safe place to work and a seaworthy vessel to a workman who comes on board for the specific purpose of repairing a pump used in discharging oil so that the work of discharging oil from the vessel could continue?

Statement of Facts

The petitioners, who were respondents below, seek issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit. That court heard the argument in this case twice, once by three members of the court and then *en banc*. The majority of the court reversed the judgment of the trial court dismissing the libel and remanded this case for further proceedings in conformity with its opinion.

The libel in this case states four causes of action. The first cause of action is based on unseaworthiness, the second is based on negligence. Both plead the Wrongful Death Act of New Jersey, N. J. S. A. 2A:31-1 *et seq.* (2a-7a). (References herein are to the appendix of libellant-appellant in the Court of Appeals.) The third and fourth causes of action are survival counts based on unseaworthiness and on negligence respectively, and were for the pain and suffering etc. of the deceased himself (8a-11a).

On December 6, 1952 at approximately 1:25 p. m., the m/v Tungus, respondents' vessel carrying a cargo of coconut oil, among other things, was tied up at Bayonne, New Jersey. The vessel had been docked at about 5:30 p. m. the prior afternoon and had been in the process of discharging some coconut oil from the port tank of the vessel (624a;

625a; Exh. R-6, 635a). El Dorado Oil Works, the respondent-impleaded and employer of the deceased, was receiving the oil from the vessel.

The Chief Officer of the vessel and the officer-on-watch were on duty (331a). In addition the Chief Officer had ordered two men to remain on board all night to help in discharging oil. These men were "to be used for ship's equipment, to drive winches, and to hoist their equipment on board the ship" (331a). These men were paid overtime by the vessel for remaining on duty (376a). The Captain of the vessel had remained on board the vessel that night (350a) as did other members of the crew (207a; 389a).

According to Mr. Wagner, an employee of El Dorado, called to testify by respondent-impleaded, he had received orders from the deceased to repair the pump to be used in unloading respondent's vessel and to check it on the morning of the day before the accident (506a). They checked it after Wagner finished, found it in good working order and it was then taken to the pier to await the arrival of respondents' vessel (507a). The deceased had nothing further to do with this pump until he boarded respondent's vessel about 1:25 a. m. the following day (513a).

The pump and hoses were taken on board at about 6:30 p. m. and they commenced to pump oil at about 8:05 p. m. (625a; Exh. R-6).

Mr. O'Leary, an El Dorado employee, was called by respondent-impleaded to testify. He was the one who had the job of getting the pump installed and started (509a). He stated that the ship's crew had taken off the tank cover with the ship's winches and were turning it to an angle across the tank top when he went on board to place the pump (510a). The Mate was giving signals to the persons

"who were manipulating the tank lid" (511a). O'Leary told the crew to place the pump "so that the suction side would be at the open hole" (511a). The ship's crew helped him by holding the hose while he bolted the hose in place (515a). The pump operated in a "satisfactory condition" until he was relieved at 8:30 or 8:40 p. m. by Mr. Sampson, another El Dorado employee (513a; 517a). Sampson was "standby on the pump" until 11:00 p. m. and he testified that the pump "was working good, very good" (530a; 531a).

The Chief Officer claimed that at about 9:00 p. m. he received a report from the Second Mate, who was on watch (335a). As a result he went over and looked down in the hatch. He saw no one attending the pump so he went to Mr. Sexton's office on the pier and told Mr. Sexton, the man in charge of shipping and receiving for El Dorado, that they should have a man standing by on the pump and that there was something wrong with the pump because it smoked (336a). Somebody came on board and took care of that (336a). This alleged incident was not recorded in the ship's log (625a, Exh. R-6).

Another incident was related by Mr. Mallet, a cargo surveyor, whose firm is still retained by Barber Lines, the agents for respondents in New York, who testified for respondents (43a; 65a; 286a; 303a). He had finished his duties at about 8:00 p. m. (295a). He remained on board the vessel that night as a matter of personal convenience (296a). At about 11:45 p. m. the Third Officer told him that there was some oil leaking from the pump. It wasn't much of a leak. When he came out again, later he observed that "oil was now spurting at a great rate" (297a; 298a). He stated that "there was oil on everything, all over the place" (306a). He stated that the smaller leak he first observed was the start of the larger leak that developed (311a).

At that point he stated "the Chief Officer and I went down below to the 'tween deck to inspect the cargo down there" (300a). According to Mr. Mallet's notes at 12:45 p. m. the leak was repaired and the El Dorado men were trying to start the pump again but they failed. He then left and went into the "officer's accommodations" (301a).

The fact that the pump was leaking came to the attention of the Chief Officer at 12:15 a. m. from the officer on watch (337a). The Chief Officer went on deck and he looked down and saw "oil was spurting out of the hold" (337a). The officer on watch went to get the El Dorado men. The Chief Officer went down in the hold "because a lot of oil had been thrown around by the leak, and cargo had been damaged" (337a). After the inspection he had an argument with Mr. Sexton about responsibility for the damage to the cargo on the vessel and he "told also to sweep the tank hold—tank covers, where the crew was working on." The Chief Officer also claims he offered sand and sawdust to Mr. Sexton "in order to minimize the danger of slipping in the oil" (338a). He stated that the leak had caused oil to be on the tank lids and on the shelter deck and oil "was all over the place" (384a). He stated that the reason he "suggested" to Mr. Sexton that he put sawdust on the oil was "in order to secure safety" (387a). However, he stated that he was not concerned with the safety of the El Dorado men who might have been working around there (366a).

Prior to the occurrence of the leak and at about 11:00 p. m. Mr. Sampson was relieved as standby on the pump by Mr. Russo, a maintenance mechanic's helper (530a). Russo was under the jurisdiction of Mr. Sexton, the El Dorado receiving foreman at that time (204a). He reported to Mr. Sexton for duty (243a). Mr. Sexton testified that Russo "was loaned from the Maintenance Department, which was due to a union deal that we had down there" (554a).

About 20 minutes after he got there, Russo testified that he went out to the pier for some rags and when he came back "one of the crew yelled that there was a break in the pump, a leak" (205a; 563a). Russo testified that he shut off the pump and the ship's crew, with a sledge hammer, put a peg into the nipple opening on the pump to stop the leak (205a-207a). This occurred according to Russo at about 11:25 or 11:30 p. m. (208a).

After the pump had been shut off and the oil stopped Russo went to the pier to inform Mr. Donohue, the assistant maintenance foreman (212a; 152). Donohue went on board with Russo and they surveyed the situation, obtained some more fittings and repaired the pump. Then they tried to "get suction" on the pump but couldn't (212a; 168a). While Russo and Donohue were working, there were officers and crew members on the same deck in the area (207a; 213a; 166a).

When Russo and Donohue started to work around the pump they "squeeged" some of the oil from the tank lid around the immediate working area, but they didn't clean the tank lid completely (167a; 218a; 496a; 497a). At this time Russo was not working under Donohue, who was assistant to the deceased in "supervising maintenance work," but was working as "standby on the pump" for Sexton (151a-153a; 204a; 496a).

When they couldn't get suction on the pump, Donohue talked to Sexton and they decided to call the deceased (168a; 538a).

The deceased, Carl E. Skovgaard, was employed by respondent-impleaded, El Dorado Oil Works, as a maintenance foreman about 2½ to 3 years before his death (135a; 271a).

On the night of the accident, the deceased was home with his wife having coffee and pizza pie when a call came from the plant (141a).

Mr. Sexton, a witness for respondent-impleaded, testified that he was the "shipping and receiving foreman" for El Dorado at the time of the accident (535a). He checked the temperature and the depth of the oil in the tank with the surveyor when the vessel came in (536a). He went on board again after they started pumping oil (537a). Later he received notice from either Russo or Donohue that there had been a break in the pumping operation (537a). He went on board again approximately at midnight (537a). Later when he returned from calling the deceased, he had a conversation with the Chief Officer of the ship (539a; 566a). They had a "heated discussion" about a statement for damaged materials which the Chief Officer wanted Sexton to sign (539a). Sexton denied that any conversation was had about the placing of sand and sawdust on the oil in the shelter deck (539a). During the time Sexton was talking to the Chief Officer, the deceased came on board (539a).

Mr. Mallet testified that the hatch coaming on the tank was stated to be 35 inches high (317a). After the accident he made measurements and found the oil 22 feet down from the tank coaming on one side and 21 feet 7¾ inches down on the other side giving the vessel a list of 2 degrees 6 minutes. The tank was about 30 feet deep (67a). The witness stated that the tank cover was 9 feet 8 inches long but he didn't measure its width (323a). Russo stated that the tank was about half open (202a). The temperature of the oil was 117° F. (624a, Exh. R-6). Russo and Donohue testified that there wasn't sufficient light provided by the vessel (174a; 234a).

There was testimony by Russo that when the crew had put a peg into the leaking hole immediately after the leak was discovered no more oil came out of the pump or the pump connections (208a). Russo estimated the time to be 11:25 or 11:30 p. m. (208a). It appears that coconut oil remained on the tank cover, the hatch beams and adjoining area for at least one hour before the accident to the deceased without any action being taken by the officers and crew of the vessel to reduce the hazard created by this oil near an open unguarded tank of hot oil where men had to work (219a). The respondents admit that no guards or ropes were placed around the tank opening (216a; 196a).

This was the situation which existed when the deceased came on board. The court below stated that at 1:25 a. m. the deceased boarded respondents' vessel. He went down to the shelter deck to assist Donohue and Russo. He moved from the foot of the ladder which led from the main deck. As he walked aft of the port tank he stepped on the hatch beams and while attempting to step on to the tank top, he "slipped on the spilled oil and fell to his death into 8 feet of hot oil" (638a).

Russo described the accident. He stated that he first noticed the deceased at the port side ladder while he and Donohue were trying to get suction on the pump after it had been repaired (215a). There was no oil aft of the port tank where the deceased had been standing (225a). From this position at the ladder the deceased had instructed them to start the pump and to shut it off. When they couldn't get suction he walked around to the starboard side. He "walked over casual like, the way he normally would" (217a). He "stepped up on a beam and commenced to come forward" (216a). He had one foot on the tank top and the other foot slipped and the deceased went into the open unguarded tank (218a; 248a). Nobody had given

the deceased any warning of any kind such as "Be careful, it is slippery around here" (217a).

Donohue also saw the deceased fall into the tank. He stated that the deceased slipped on oil from between the hatch beam and the hatch cover (171a). Sexton testified he looked down into the shelter deck after his argument with the Chief Officer. He observed the deceased in the after port corner of the shelter deck (540a). Then he observed the deceased walking around the after end of the port tank and he saw the deceased put one foot up on the beam between the tanks. When the deceased "attempted to put the other foot on the hatch cover" he slipped (541a).

Russo went down the ladder inside the tank and then Donohue went down, too. They climbed down a walkway in the tank and they looked for the deceased but didn't see him. Then a rope was dropped to them. They tied it to the ladder across the top of the oil. Russo grabbed hold of the rope and probed for the body in the oil with his feet. In the meantime a light was dropped. Finally they recovered the body of the deceased which was removed in a basket (172a; 235a; 489a-493). Sexton left the vessel and called an ambulance (541a). Sexton brought back a metal stretcher from his office with the Chief Officer of the vessel, but he stopped at the top of the gangway and did not go aboard the vessel (542a). The death certificate for the deceased states among other things that the cause of death was "suffocation and shock following submersion in oil" (612a, Exh. L-7).

The pump crew left the ship after the accident. A new pump gang came on board at 3:30 a. m. (626a, Exh. R-6). O'Leary, who was the first man to return, found that everything had been "sawdusted down" and ropes were being put up by the ship's crew (520a; 521a).

The Captain of the respondents' vessel had testified on deposition concerning the duties of the ship's officers. He stated that it was part of the duties of the Chief Officer on the vessel "to look after the cargo, upkeep of the ship, and to look after the crew; all the work as to the ship comes under him" (70a; 583a). It was the Chief Officer's duty to conduct inspections of the vessel while discharging operations are going on (71a; 584a). It was the duty of the officer on watch to be on the lookout for any defective conditions which might arise and with respect to any unsafe conditions it was his duty to correct them (72a; 75a; 584a).

The Chief Officer of the respondents' vessel testified concerning his duties. He stated that everything concerning the cargo is the Chief Officer's duty (351a). As Chief Officer, he inspected the vessel, while in port at least once an hour "going around the ship, looking in the hatches, and see that the cargo is discharged properly" (353a). He considered these inspections as part of his duty (353a). He stated that if he observed any unsafe condition which might cause injury to anybody aboard the vessel it was his duty to do something about it "as long as it is possible" (354a).

The ship's log had reported the events in part (625a):

"Saturday, December 6, 1952.

Pumping of oil from port tank continued past midnight.

At 0015 the oil connection burst where the steam pipeline is screwed on to same, becoming leaky. The leakage was detected by the ship's 3rd Officer who was on watch. The 3rd Officer tried immediately to call men from the pump crew, but it was found that none of the pump crew was on board. Before the 3rd Officer had succeeded in getting hold of the men which were

down on the dock the connection was broken off and the coconut oil gushed out into the starboard side of the shelter deck and down through the hatch covers in the forward part of the tank into the No. 3 lower hold. The pump was stopped immediately as the men came on board. The oil, however, continued to pass through the leaky place as the oil was running back through the oil hose. However, one succeeded in stopping the leakage by inserting a plug, but not before several tons of oil had run into the deck and lower hold.

* * * * *

At 0125 the foreman for the pump gang, Carl Skovgaard, who was engaged in inspecting the electric pump which was placed on the tank cover, which was laid across the tank trunk, fell down into the oil in the deep tank, which then was about 8′ above the bottom and 22′ from the top of the tank. The reason that he fell was that he slid in the oil which had been spilled across the tank cover on account of the leakage that had been caused. The ship's Chief Officer had called attention to that one had to scatter sawdust or sand on the tank cover before work was resumed.

His assistants immediately ran down the ladder into the deep tank in order to get hold of him. The ship's watchman and the First, Second and Third Officers immediately ran to get hold of gear, as a boat hook, and rope. Ambulance and doctor were sent for and stretcher and booms were made ready in order to get the victim ashore.

December 6, 1952 cont'd.

At 0135 they had found the lifeless body of the victim and brought him up on one of the longitudinal heavy girders in the tank. He was immediately put

on the stretcher and (home) ashore. He was landed on the dock at the same time as the ambulance and doctor arrived. The doctor could only pronounce him dead. After the accident the pump crew left the ship without emptying the pump or the hoses."

The opinion of the trial judge is reported in 141 F. Supp. 653 (D. C. N. J. 1956). The court did not consider the issue of unseaworthiness and did not make any fact findings on this issue. The court stated (642a):

"I am not persuaded that the owner of the vessel is under any duty to protect the workmen of the independent contractor, El Dorado Oil Works, engaged by the owners of the cargo of coconut oil, against the dangerous conditions created by the very work for which the independent contractor was hired. * * * "

The libel was dismissed and the impleading petition was dismissed (643a). Libelant appealed from dismissal of the libel (644a).

Holding that the trial judge's basic premise as to law was erroneous, Judge Staley stated (Pet. 17a):

"The duty of providing Skovgaard with a reasonably safe place to work, * * * would not be lessened even if there were a concurrent duty on the part of Skovgaard's employer. * * *

While the New Jersey wrongful death statute adopts the maritime standard of care, it is silent as to available defenses. It is not for us in the first instance, however, but rather for the trier of fact, to determine whether the vessel's duty was breached and to decide factually what defenses, if any, might be available to the respondent. The question of unseaworthiness of

the vessel is likewise one which should be determined initially by the district court."

The petitioner, before the factual determinations are made in the district court as directed, seeks review of this case by writ of certiorari.

POINT I

Two Courts of Appeal have interpreted the New Jersey Wrongful Death Act to apply the standards of maritime law in accidents which occurred on the navigable waters within the geographic jurisdiction of the State of New Jersey and there are no conflicting decisions on this interpretation of New Jersey law.

Two Courts of Appeal, in the Second Circuit and the Third Circuit respectively, which handle a large volume of maritime cases, after lengthy and thoughtful argument and consideration have agreed that the New Jersey Wrongful Death Act permits an action based on unseaworthiness and applies maritime principles of tort liability where the deceased, if he had lived, would have had a right to recovery on such principles of liability. *Skovgaard* v. *The M/V Tungus,* 252 F. 2d 14 (3 Cir. 1957); *Halecki* v. *United New York and New Jersey S. H. P. Ass'n,* 251 F. 2d 708 (2 Cir. 1958). This court in *Kernan* v. *American Dredging Co.,* —— U. S. ——, 78 S. Ct. 394, —— L. Ed. in footnote 4 of Mr. Justice Brennan's opinion referred to the opinion of the Court of Appeals in this case with apparent approval indicating in said footnote that the reasoning of the court in the *Skovgaard* case was consistent with the decisions of this court in determining the remedy available for death occurring on navigable waters, In addition, the decision of the Court of Appeals in this case is consistent with

and logically follows the decisions of this court in *Pope & Talbot* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Levinson* v. *Deupree*, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); *Just* v. *Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941); *Western Fuel Co.* v. *Garcia*, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed 210 (1921); *Old Dominion S.S. Co.* v. *Gilmore*, 207 U. S. 398, 28 S. Ct. 133, 52 S. Ct. 264 (1907). Pursuant to these decisions it is clear that although maritime law does not give the next of kin of a deceased a right to recover under the maritime law itself, the maritime law will adopt and enforce a state wrongful death act to supplement the general maritime law.

The petitioners do not quarrel apparently with the construction of the New Jersey Wrongful Death Act which would permit recovery for negligence. This has been established for several years. *Gill* v. *United States*, 184 F. 2d 49 (2 Cir. 1950; *The H. S. Inc. No. 72*, 130 F. 2d 341 (3 Cir. 1942). On the other hand the libelant does not claim that the maritime law, by itself, gives a remedy to the next of kin for wrongful death. The issue in this case is not whether the maritime law permits recovery for wrongful death but whether the New Jersey Wrongful Death Act when adopted and enforced as part of maritime law will use the same test of liability as the deceased would have had if he had lived. The issue, as framed and decided by the majority in the Court of Appeals, involved *a construction of a state wrongful death act* rather than any alteration or departure from existing decisions of this court.

POINT II

The interpretation by the Court of Appeals of the New Jersey Wrongful Death Act is fully consistent with the plain language of the statute and the New Jersey decisions interpreting the statute.

The construction of the Court of Appeals in holding that the New Jersey Wrongful Death Act incorporated the same test of liability as would be applied if the deceased had lived was consistent with the plain language of the Statute and with the decisions of the New Jersey courts.

N. J. S. A. 2A:31-1 provides in part:

> "When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, * * *"

The courts of New Jersey have consistently held that the test of liability under the New Jersey Wrongful Death Act is the test of liability which would apply if the deceased had lived. In *Consolidated Traction Co.* v. *Hone*, 59 N. J. L. 275, 35 A. 899 (Supr. Ct. 1896), Chief Justice Beasley had stated in interpreting the New Jersey Wrongful Death Act at page 900 of Atlantic:

> "* * * From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz: *First, could the deceased, if he had survived, have maintained an action?* And, second,

this being so, what pecuniary loss has fallen on his next of kin by reason of his death? * * *" (Italics ours.)

The above is quoted with approval in *Bastedo* v. *Frailey*, 109 N. J. L. 390, 162 A. 621 (E. & A. 1932). In view of the above, the Court of Appeals properly held that the test of liability, *i.e.*, the right to maintain an action was determined by the rights the deceased would have had if he had lived. See also *Coulter* v. *New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Sup. Ct. 1932), where it was held that suit could not be brought for wrongful death where the Statute of Limitations had run before the death of the deceased, because "the statute only gives an action if the deceased had one." Not only is the nature and extent of the liability under the New Jersey Wrongful Death Act made co-extensive with the liability the deceased could have alleged if he lived, but the broad wording of the statute permits recovery for unseaworthiness as well as negligence.

Judge Staley, writing for the majority, stated (Pet. 15a):

> "We hold that failure to provide a seaworthy vessel in the case before us is such 'wrongful act, neglect or default' as will allow recovery under the New Jersey Wrongful Death statute."

Judge Learned Hand in the *Halecki* case held with reference to the New Jersey Statute and the warranty of seaworthiness (Pet. 35a):

> "* * * We hold that 'neglect' and 'default' both cover a breach of the warranty."

The conclusions of Judge Staley and Judge Learned Hand are amply supported. In *Judson* v. *Peoples Bank & Trust Company of Westfield*, 17 N. J. 67, 110 A. 2d

24 (1954), in constructing the meaning of the "wrongful act, neglect or default" of joint tortfeasors Mr. Justice Brennan held that the phrase included all torts of commission and omission. See also *Burns* v. *Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955), where the words "wrongful act, neglect, or default" in a limitations statute were held to include a cause of action for personal injuries whether the action was based on tort or contract concepts.

In *Orez* v. *American President Lines, Ltd.*, 154 Fed. Supp. 241 (S. D. N. Y. 1957), the phrase "wrongful act, neglect, or default" as used in the New Jersey statute of limitations was held to include a claim based on unseaworthiness. The same phrase in the New York Wrongful Death statute has been held to include an action based on a warranty of fitness for use. *Greco* v. *Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938). The construction given to the New Jersey Wrongful Death Act by the Court of Appeals was reasonable and in full accord with the decisions of the courts of New Jersey interpreting the act. No New Jersey case directly or indirectly stands for the proposition which petitioner urges this court to adopt.

The construction given by the Court of Appeals is further buttressed by the fact that the New Jersey courts regard the New Jersey Wrongful Death Act "entirely and in the highest sense remedial in its nature." *Haggerty* v. *Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865). In construing it, "the rule is to avoid all subtle inventions and evasions for the continuance of the remedy" and "the duty of the court is to add force and life to the cure and remedy." *Murphy* v. *Board of Chosen Freeholders of Mercer County*, 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). See also *Hartman* v. *City of Brigantine*, 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957). Aside from the rule of construction that

a remedial statute is to be liberally construed the court also must adopt a reasonable and fair construction in preference to a harsh or arbitrary one. If the construction of the Court of Appeals is rejected then an absurd situation would arise. Where a deceased died on a vessel in navigable waters of the United States and within the geographic area of a state his survival cause of action would be determined under maritime law, *Pope & Talbot, Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953), while the wrongful death action would be determined by analogous state law applied to situations on land. *Cf.* Comment of Judge Woodbury in *O'Leary* v. *United States Line Company*, 215 F. 2d 708 (1 Cir. 1954), cer. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955). In the absence of any direct statement in the statute or any construction by the New Jersey courts that such an absurd situation was a desired purpose of the New Jersey Wrongful Death Act, the Court of Appeals properly gave the statute a fair and reasonable construction.

Obviously the purpose of the act is to incorporate the test of liability which would have existed if the deceased had lived. In this respect the next of kin are given neither greater or smaller rights than the deceased. In a case where the deceased died as a result of injuries received while a business invitee in a retail store, the law relating to the rights and duties of business invitees and storekeepers would apply. By the same logic where the deceased died as a result of injuries received on navigable waters within the boundaries of a state the law relating to the rights and duties of shipowners and those who come on board would apply. Since *Pope & Talbot, Inc.* v. *Hawn*, cited *supra*, the law applied would be the maritime law of the United States. It would be unreasonable to conclude that the legislature of New Jersey intended it otherwise particularly in view of the referral nature of the statutory language.

The New Jersey Wrongful Death Act does not have any language in it setting forth either contributory negligence or assumption of risk as defenses to an action brought under it. Judge Staley in the court below, writing for the majority, did not rule specifically on the issue of defenses available to the vessel on the ground that the factual determinations should be made first by the trier of facts on the remand of the case (Pet. 18a). Judge Learned Hand in the *Halecki* case held specifically (Pet. 37a):

> "* * * and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

It is not necessary in this case for this court to review this question because it has not been passed upon in the opinion of Judge Staley. If the trier of facts on the remand of this case finds that the deceased was not contributorily negligence and did not assume any risk then the legal issue raised as to such defenses is moot.

In any case Judge Hand's determination in the *Halecki* case is consonant with a reasonable interpretation of the New Jersey Wrongful Death Act. The test of liability is coextensive regardless of whether the deceased had lived and recovered for his personal injury or dies and his next of kin sue. It would require a finding of unreasonable logic on the part of the New Jersey legislature in passing a remedial statute to hold that a widow's claim could be barred by contributory negligence, however slight it may be, but that the deceased, if he had lived could have recovered. The legislature did not intend such a result. It did not specifically set forth such defenses. Instead it used a "referral test" for the very purpose of avoiding such an anomoly. See *The Devona*, 1 Fed. 2d 482 (D. C. Me. 1924).

POINT III

Under the maritime law and under New Jersey law the owner of a vessel is under a duty to provide a workman who comes on board a safe place to work.

Judge Staley, writing for the court below stated (Pet. 17a):

> " * * * It is relevant to note at this point that Skovgaard was called for the purpose of repairing the pump, not to clean up the oil spill. It is alleged that his death was caused by the condition of the deck and tank and not by the instrumentality he intended to repair. * * * "

In spite of this finding which is supported by the evidence, the petitioner still claims that working on an oily deck was a "risk" or "danger" arising from the employment of the deceased for which the vessel's officers, who had direct knowledge of the condition, were not responsible under New Jersey law. Since the test of liability is maritime law, the New Jersey decisions on this point are immaterial. Even if maritime law did not provide the test of liability, the New Jersey law does not help the petitioner. In the case of *Berquist* v. *Penterman*, 46 N. J. Super. 74, 134 A. 2d 20 (App. Div. 1957), cert. den. 25 N. J. 55, 134 A. 2d 832 (1957), Judge Goldman made the same distinction that Judge Staley did in this case. At page 25 of Atlantic, he stated:

> "The general rule is that an owner or occupier of premises who, by invitation, express or implied, induces a person to come upon the premises, is under a duty to exercise ordinary care to render the premises reasonably safe for the purpose embraced in the in-

vitation. * * * Point Pleasant seeks to escape liability under that rule by arguing the applicability of the exception engrafted upon it by the court in Broecker v. Armstrong Cork Co., 128 N. J. L. 3, 7, 24 A. 2d 194 (E. & A. 1942); that an owner is not liable where an independent contractor or his employee comes upon lands by invitation 'to correct the precise condition which causes the injury.' * * * We do not consider the exception applicable to the instant case. Berquist's injury and eventual death did not stem from a dangerous condition he was called on to correct, or one which necessarily inhered in the work he was doing. * * * "

The holding that under maritime law the deceased, if he had lived, would have been entitled to a safe place to work and a seaworthy vessel is well supported. *Petterson* v. *Alaska S.S. Co.*, 347 U.S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954), *Pope & Talbot Inc.* v. *Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Seas Shipping Co.* v. *Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). His work was directly connected with the discharge of oil from the vessel.

CONCLUSION

The petition should be denied because

(a) The issues were fully and completely presented and argued in the court below and were correctly decided.

(b) The issue basically involves the interpretation of the New Jersey Wrongful Death Act and the interpretation of the court below is supported by the language of the statute and the decisions of the New Jersey courts to the extent they are applicable.

(c) The decision of the court below logically follows and is fully consistent with the decisions of this court

(d) The matter is not ready for final determination because there are additional factual issues to be resolved by the trier of the facts.

Dated: Hoboken, N. J.
April 18, 1958

Respectfully submitted,

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